Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

RONALD TRUCCHIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One: Whether, and to what extent, a court of appeals may review the sufficiency of the evidence supporting a criminal jury verdict where the criminal defendant seeking review made a motion for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure at the close of the Government's case-in-chief and received an adverse ruling from the court at that time; but neither renewed that motion after calling only one defense witness and after not testifying in his own behalf, i.e., did not renew that motion after the close of all of the evidence, nor in a posttrial motion for a judgment of acquittal?

Question Two: Whether the statute of limitations reasoning of *Grunewald v. United States*, 353 U.S. 391 (1957) still applies to a criminal RICO conspiracy, which crime does not require proof of an overt act as an element of that crime?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, RONALD TRUCCHIO, petitions this Court to review the final judgment and opinion of the United States Court of Appeals for the Eleventh Circuit issued in this case.

OPINION BELOW

The federal appellate court decision to be reviewed is unpublished. A copy of that typewritten document is reproduced in the appendix to this petition at App. 1.

BASIS FOR JURISDICTION

The decision of the lower federal appellate court was filed on January 30, 2007. This Court has jurisdiction to review this petition pursuant to Title 18 United States Code section 1254.

FEDERAL RULE AND STATUTORY PROVISION INVOLVED

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 29. **Motion for Judgment of Acquittal**

(a) **Before Submission to the Jury.**

After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is

insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) **Reserving Decision.**

The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) **After Jury Verdict or Discharge.**

(1) **Time for a Motion.**

A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) **Ruling on the Motion.**

If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) **No Prior Motion Required.**

A defendant is not required to move for a judgment of acquittal before the court submits

the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) **Conditional Ruling on a Motion for a New Trial.**

* * * *

TITLE 18 UNITED STATES CODE SECTION 3282 provides:

3282 **Offenses Not Capital**

(a) Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

Petitioner Trucchio and others were charged with the single crime of a conspiracy to violate RICO[1] in violation of Title 18 United States Code section 1962(d). The federal district court had jurisdiction to try this case pursuant to Title 18 United States Code section 3231. The first indictment commencing this prosecution was filed on December 2, 2003. None of those codefendants was tried with defendant Trucchio. Jury selection commenced on January 31, 2005. On February 25, 2005, which was the seventeenth day of trial, the jury returned a verdict of guilty on the

[1] "RICO" is an acronym for the crime of being a Racketeering Influenced and Corrupt Organization.

single count with which Mr. Trucchio was charged.[2] Although Mr. Trucchio was only charged with a single crime and although Mr. Trucchio was the only person on trial before this jury, the jury deliberated over a three-day period and required the giving of a modified Allen charge before returning its verdict of guilty.

The Government introduced extensive testimony to establish the elements of a RICO conspiracy involving a group called the Young Guns, which initially went by the name Liberty Posse. This group of about twelve want-to-be gangsters ranged in age from thirteen to early-twenties years old. This gang initially formed in the year 1986. Over the course of its existence, this group operated in both the New York City, New York area and Florida.

During the trial, the Government established that this Young Guns RICO criminal "enterprise" was engaged in stealing cars, perpetrating commercial and residential burglaries, dealing in stolen property, rifling mail to intercept credit cards that were then illegally used, selling drugs, committing assaults, engaging in armed robberies of banks, of an armored car, and of several different persons, and, finally, included commission of a double homicide by some members of the Young Guns.

One Government witness testified that he dealt with this group from 1986 through 1995 and described all of the crimes he knew were committed by persons who were

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[2] In keeping with the requirements for a petition for a writ of certiorari, this statement of the case includes only the most pertinent facts needed to understand this petition. The Government attempted to prove in detail all of the crimes committed by the Young Guns. That is why this trial lasted as long as it did.

members of the Young Guns. Another Government witness, who testified that he was not a member of the Young Guns, discussed his knowledge of this group during the late 1980's through the 1990's. The Young Guns broke up by the year 1997.

The Government attempted to tie petitioner Trucchio with the Young Guns RICO criminal enterprise in the following manner.

The Corozzo brothers, who were members of the Gambino crime family of the Mafia, were involved in the Ozone Park and Howard Beach areas of New York City. Organized crime members wanted proceeds of the crimes that non-Gambino-crime-family criminals were committing. It would be dangerous for those criminals to operate without dealing with a crime family. Consequently, criminal groups aligned with an organized crime family. If a criminal did not deal with the Gambino crime family, then that criminal dealt with another crime family. These criminals had to pay the crime family to continue to operate criminally. This payment was a "street tax." The crime family could help the criminal group deal with problems such as assist in resolving complaints regarding victims of those criminals. However, members of a crew did not always abide by the decisions of the organized crime members. Petitioner Trucchio was identified as a member of the Gambino crime family operating under the Corozzo brothers.

According to one Government witness, the leader of the Liberty Posse/Young Guns was paying tribute to

defendant Trucchio[3] from the year 1988 into the 1990's. This tribute was the payment of a percentage of money made from the crimes committed by this Young Guns RICO enterprise.

Government witness Ciaccio was in prison from 1998 until January of 2002. Regarding the Young Guns prior to his incarceration, Ciaccio testified that the few members that were still left "[e]verybody was locked up." "The few

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[3] An agent of the F.B.I. testified to the relationship between the Gambino crime family and nonmember associates. Associates, who are definitely not members of the crime family, affiliate with that crime family for protection. The associated nonmember could use the Mafia to resolve beefs or problems that the associate might encounter with another criminal, who may or may not be associated with an organized crime family. This is the protection that permits resolution of disputes among criminals. Nonmember underworld associates are not formal members that have been formally inducted into the Mafia family. These associates are not "made" members of the Mafia and do not have to be Italian. They only have to be criminals. These criminals must pay tribute, i.e., kick money, to the Mafia members for the right to be associated with the Mafia. Associates can run their own crews, as opposed to being run in day-to-day operations by a member of organized crime. These associates are street thugs, who engage in any crime that will make them money. An associate lets Mafia members know of his criminal activity to the extent the associate wants protection for those crimes. This is done so that if there is a problem, the associate can turn to the Mafia soldier to get that associate out of the problem. Associates can become unassociated with an organized crime family rather easily, because an associate is not a formal member of that organized crime family. An associate may not advise a Mafia member of what he is doing in order to avoid paying tribute for that criminal activity. The risk that the associate runs is that if the Mafia member finds out, the associate can be in trouble for hiding money or, if a problem develops, the Mafia may not assist in resolution of that problem. If a person committed crimes in an area and was caught doing so, the Gambino crime family could beat that person up, kill him or chase him from the area. For that reason, a criminal would associate and kick up money to an organized crime member.

members that were left out there were at that time incarcerated. . . ." After "most of the guys were locked up," "whatever was left, which was like a minor league team, they were doing whatever little crimes they could do." Ciaccio reiterated that the Young Guns broke up in **1997**. "In **1997**, you know, there was like, **like I said**, they considered themselves Young Guns, but they were like a minor league baseball team." The Government never introduced other testimony to refute this testimony of its own witness that the Young Guns ceased operating as an illegal moneymaking business in 1997. Ciaccio testified that he, Ciaccio, was himself arrested and incarcerated in **late 1998**, remaining incarcerated into the year 2002. This witness had no personal knowledge of any crime committed **in furtherance of** the Young Guns RICO conspiracy after December 2, 1998. Ciaccio did not testify to an overt act committed by the Young Guns enterprise after December 2, 1998.

Government witness Kondrotas, who was an admitted member of the Young Guns criminal enterprise, testified that he, himself, had been incarcerated continuously since the year **1997**.

After indictment and arrest, various members of the Young Guns and defendant Trucchio were brought by the Government to the Southern District of Florida to face trial on the pending indictment. Those persons were incarcerated at the Federal Detention Center in Miami, Florida in the year **2004**. While defendant Kondrotas was incarcerated in the Federal Detention Center with other Young Guns members to face trial on this indictment, Kondrotas testified to various conversations held at that federal detention center. During that time, there was a discussion of possible witnesses who might be called to

testify at the pending trial on this indictment. Once, gang member Callegari stated that "We **should** try to get" one person killed. Callegari "**just mentioned**" to Kondrotas that they should try to kill another person. From discovery, Kondrotas learned that gang leader Antinuche initially had a cooperation agreement in 1998, but changed his mind. Callegari "**wanted** to hurt" Antinuche. Antinuche "**wanted** to kill" the federal prosecutors that were prosecuting this case. Gang members Bruno and Callegari **talked about** killing defendant Trucchio, because they were fighting with Trucchio as a result of the fact that Trucchio found out that Bruno had been paying money to a member of the Genovese organized crime family instead of paying tribute to Trucchio and to hinder proof that they were paying tribute to Trucchio. Later, Callegari **stated**, "Once we beat this case . . . , we're going . . . to kill all those old [Gambino] guys." Kondrotas discussed the indictment with other codefendants for the purpose of getting possible witnesses to change their testimony "to obstruct justice."

Prior to trial, petitioner Trucchio filed a motion to dismiss the indictment on the ground that his prosecution violated the statute of limitations. Noting that the indictment alleged on its face that the RICO conspiracy continued until return of this indictment, Mr. Trucchio asserted in his motion that discovery led to the conclusion that this prosecution was not timely commenced and that the indictment should be dismissed. This motion was expressly filed to preserve this issue prior to trial.

During trial at the close of the Government's case-in-chief, defendant Trucchio moved for a judgment of acquittal on the basis that the indictment was filed after the statute of limitations period for this crime had expired. Defense counsel argued that the evidence established that

the Young Guns disbanded in 1997, that the former members were thereafter incarcerated, and that there was no interaction between those former gang members between 1997 and 2004 that involved activity in furtherance of the charged RICO conspiracy. That motion was denied. The Government responded that the statute of limitations had not expired, because this RICO conspiracy continued when the members again rejoined at the Federal Detention Center in Miami, Florida in the year 2004 – where the Government, itself, gathered these incarcerated codefendants to face trial on this indictment – and while those members sought to identify, locate and murder potential witnesses. The trial judge denied this Rule 29 motion at the close of the Government's case-in-chief.

The defense called one witness to contradict the testimony of one of the several Government witnesses. Petitioner Trucchio did not testify. The Government did not present a rebuttal case. After the defense rested and the Government rested without presenting a rebuttal case, petitioner Trucchio's defense attorney did not make a renewed motion for a judgment of acquittal at the close of all of the evidence.

Defense counsel did request a jury instruction on the statute of limitations issue and received one. The trial judge instructed the jury that it had to acquit the defendant if it found that this RICO conspiracy terminated on or **before December 2, 1998**. Defense counsel argued to the jury that the Government failed in its proof that the statute of limitations was satisfied.

Prior to the start of deliberations, both parties agreed that the jury should be instructed that the enterprise charged in this indictment was the Young Guns or its prior

appellation of Liberty Posse, and that this indictment did not charge the Gambino crime family as the enterprise at issue in this indictment. The Government also conceded that membership in the Gambino crime family was insufficient to support a conviction under this indictment. Thereafter, the jury was instructed that the criminal enterprise was not alleged to be the Gambino crime family.

Following the return of the jury verdict, petitioner Trucchio did not make any posttrial motion concerning the trial.

Petitioner Trucchio took an appeal. During that appeal, petitioner Trucchio argued that he was entitled to a judgment of acquittal on the basis that the statute of limitations had expired before the pending indictment was filed; among other things, insisting that *Grunewald v. United States*, 353 U.S. 391 (1957) prevented the Government from relying on the testimony it elicited about what occurred at the Federal Detention Center in the year 2004. Petitioner Trucchio also argued on appeal that the evidence was insufficient to establish that Trucchio agreed with the Young Guns organization to participate in the operation or management of the Young Guns criminal enterprise, itself, as that concept was established in *Reves v. Ernst & Young*, 507 U.S. 170 (1993) or otherwise agreed to control the operations of this particular illegal enterprise.

In its answer brief, the Government argued that the failure of petitioner Trucchio to renew his motion for judgment of acquittal at the close of all of the evidence "forecloses the issue of sufficiency on appeal absent a showing of a manifest miscarriage of justice," citing circuit precedent to that effect in support of its argument, and

asserted that the lower appellate court "should summarily reject his sufficiency challenge."

In his reply brief, petitioner Trucchio challenged the validity of the Eleventh Circuit's precedent regarding the need to renew a motion for a judgment of acquittal at the close of all of the evidence. Tersely stated for the purpose of this petition, petitioner Trucchio argued that Federal Rule of Criminal Procedure 29, on its face, does not require renewal of a motion for judgment of acquittal and that the motion for judgment of acquittal made at the close of the Government's case-in-chief sufficed to permit review of a claim of sufficiency of the evidence under the normal established standard of appellate review for that motion.

Five days before oral argument in the lower appellate court, a different panel of that court filed the opinion in *United States v. Milkintas*, 470 F.3d 1339 (11th Cir. 2006), which opinion reaffirmed prior circuit precedent, stating that failure to move for a judgment of acquittal at the close of all of the evidence meant that the Eleventh Circuit would reverse a conviction "only to prevent a manifest miscarriage of justice" and that this latter standard required a finding that the evidence on a key element of the offense "is so tenuous that a conviction would be shocking." Before oral argument, the Government filed a notice of supplemental authority in order to rely on that decision.

Adopting the Government's position, the Eleventh Circuit's opinion in this case summarily rejected petitioner Trucchio's contentions as to insufficiency of the evidence to convict, noting in its opinion: "At the close of the government's case, Trucchio moved for a judgment of acquittal. After the district court denied this motion, Trucchio called

one witness on his behalf and failed to renew his motion at the close of all the evidence." (App. 4).

REASONS FOR GRANTING THIS PETITION

Question One

Last year, this Court deemed this question worthy of review, when the same issue was raised in the context of a civil appeal. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006) addressed the requirements of Rule 50(a) and (b) of the Federal Rules of Civil Procedure and its effect on the power of the circuit courts of appeal upon subsequent appellate review. By contrast, this Court has never addressed the same issue regarding Rule 29(a) of the Federal Rules of Criminal Procedure. It is submitted that this issue in a criminal case, in which a person is subject to imprisonment, is of equal importance to that already addressed by this Court as to civil litigants and equally warrants this Court's review.

Rules of procedure are issued by **this** Court, albeit based on recommendations of advisory committees and subject to approval of Congress. 28 U.S.C. §§ 2072, 2074. **This** Court has gone out of its way to insure that a criminal defendant can easily preserve an issue of sufficiency of the evidence for appellate review in the event of a conviction. This is self-evident from the wording of the entire Rule 29 of the Federal Rules of Criminal Procedure.[4]

[4] The version of Rule 29 that was in effect at the time of petitioner Trucchio's trial is found at 535 U.S. 1221-1222 (2002). Only one minor amendment of Rule 29(c)(1) was made effective December 1, 2005 and does not affect this petition.

On the face of Rule 29 **as written**, a defendant preserves his motion for a judgment of acquittal if the defendant makes his motion at the close of the Government's case-in-chief. The defendant does not have to make a Rule 29 motion at the close of all of the evidence to preserve the issue of sufficiency of the evidence to support a conviction. The defendant can fail to make his Rule 29 motion at the close of the Government's case-in-chief and **still** preserve his issue of sufficiency of the evidence by making that motion **for the first time** at the close of all of the evidence. That is how Rule 29(a) reads. There is **no verbiage in Rule 29(a)** that says that a defendant, who does make a Rule 29 motion at the close of the Government's case-in-chief, **must renew that motion at the close of all of the evidence** or forfeit the right to raise the issue of sufficiency of the evidence on appeal.

Rule 29(a) does state that a defendant, who makes a Rule 29 motion at the close of the Government's case-in-chief, can present defense witnesses without reserving the right to present defense witnesses. The fact that this rule permits a defendant to present a defense case at the trial level without preserving that trial right further establishes that a defendant **does not need to renew** that Rule 29 motion at the close of all of the evidence or forfeit the right to raise the issue of sufficiency of the evidence on appeal. The expression of one thing without expressing the other establishes that no more is required of a criminal defendant at the trial level than to make his Rule 29 motion at the close of the Government's case-in-chief in order to entitle that defendant to full review on appeal of any denial of that motion.

Rule 29(b) further supports the fact that a defendant does not forfeit his right to raise the denial of this Rule 29

motion as an issue on appeal. Rule 29(b) provides that "[t]he court may reserve decision on the motion, proceed with the trial where the motion is made before the close of all the evidence . . . [and rule later]. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved." This portion of Rule 29 addresses what evidence the trial court can consider in ruling on a Rule 29 motion, if the trial court reserves its ruling. This provision says nothing about whether a defendant must renew a motion made at the close of the Government's case, if the defendant presents evidence in a defense case after the Government rests. Indeed, this subsection says that the first motion preserves the issue for the defense as if the defendant did not present any further evidence. That is why a reservation freezes the evidence, even if the defendant thereafter presents evidence.

The death knell to any Government position of the need to renew a motion for a judgment of acquittal at the close of all of the evidence in order to preserve that issue for full appellate consideration is contained in the last section of Rule 29, which also addresses the timing for a motion for a judgment of acquittal. Rule 29(c)(1) states that "A defendant **may** move for a judgment of acquittal, or renew such a motion, **within 7 days after a guilty verdict** or after the court discharges the jury, whichever is later." This rule, as written, and construed with the prior sections of that same rule, permits a defendant to raise a Rule 29 motion for acquittal **for the first time** within 7 days after a verdict. If this was not true, then there would be no purpose in adding the clause "**or renew** such a motion." That latter clause means that this postverdict motion need not have been a renewal of a during-trial

motion in order to be made "for the first time" after the verdict. Moreover, the use of the word "or" means that **a renewal is not required**, if the motion was initially made at the close of the Government's case-in-chief. Nothing is left for debate because Rule 29(c)(3) expressly states: "A defendant **is not required to move for a judgment of acquittal before the court submits the case to the jury** as a prerequisite for making such a motion after jury discharge."

This Court made an effort to draft a rule insuring that a defendant can preserve a claim of sufficiency of the evidence for appeal in a manner that could not be made any easier for a criminal defendant. If a defendant can make his Rule 29 motion for the **first** time **after the verdict**, why must that criminal defendant renew a prior motion, which was made at the close of the Government's case-in-chief, again after the close of all of the evidence but **before** the verdict is returned in order to preserve the issue of sufficiency of the evidence for appellate review? As in all rhetorical questions, the answer becomes obvious on reflection.

Read in its entirety, Rule 29 is written to do everything to protect a criminal defendant by insuring that a defendant can preserve the issue of sufficiency of the evidence at the trial level for the purpose of raising it on appeal, if that motion is denied whenever made at the trial level. A defendant is never faced with a Hobson's choice **regarding preservation** of a Rule 29 motion for the purpose of raising that issue on appeal. Rule 29 was not written as a trap for the unwary defense attorney, who is under the pressure of an ongoing criminal trial.

Reading the literal wording of Rule 29(a), as well as the remainder of Rule 29, this Court has gone out of its way to insure that no person, who is subject to imprisonment upon conviction, will languish in jail, if the evidence is truly legally insufficient to support a conviction under the standard for review of a motion for a judgment of acquittal – which standard is the same at both the trial and the appellate levels. There is no Justice on this Court who would dispute this principle in the abstract, regardless of what any particular Justice would rule on the sufficiency of the evidence in any particular case before that Justice.

The standard for review of a Rule 29 motion for a judgment of acquittal is stated in *Jackson v. Virginia*, 443 U.S. 307 at 318 n.1, 319 (1979) and is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *See Glasser v. United States*, 315 U.S. 60 at 80 (1942) (standard at appellate level). Given this standard, what evidence can a defendant introduce in the defense case, after losing a Rule 29 motion at the close of the Government's case-in-chief, that would permit a trial judge to grant a renewed Rule 29 motion made at the close of the evidence on the basis that the Government failed to establish a prima facie case? The answer is that there is nothing that a defendant could introduce during the defendant's case that would cause a Rule 29 motion to be granted at the close of all of the evidence. Because that is true, Rule 29, as written, does not require a defendant to renew his Rule 29 motion at the close of the evidence in order for the defendant to preserve the issue of sufficiency of the evidence for appellate review following denial of his Rule 29

motion made at the close of the Government's case-in-chief.[5]

In the year 1907, this Court in the criminal case *Perovich v. United States*, 205 U.S. 86 at 91 (1907) stated the principle followed by the lower appellate court in this case.

> It is assigned for error that the court overruled a motion to instruct the jury to bring in a verdict of not guilty for the reason that the corpus delicti had not been proved. **This motion was made after the plaintiff [the Government] had rested, and upon being overruled the defendant proceeded to offer testimony. The motion was not thereafter renewed.** Without resting upon the proposition that **introducing testimony after such a motion has been overruled is a waiver of any exception to the action of the trial court (*Union Pacific Railway v. Daniels*, 152 U.S. 684; *Runkle v. Burnham*, 153 U.S. 216; *Hansen v. Boyd*, 161 U.S. 397)**, we are of the opinion that neither at that time nor at the close of all of the testimony would the court have been justified in withdrawing the case from the jury.

Effective March 21, 1946, this Court promulgated the initial version of Rule 29 of the Federal Rules of Criminal Procedure. 327 U.S. 821, 853 (1946). After this new rule

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[5] Because of the Double Jeopardy Clause, the concept of sandbagging the Government by failing to make a Rule 29 motion at the close of all of the evidence, *cf. Wainwright v. Sykes*, 433 U.S. 72 at 89 (1977), cannot rationally be invoked in this situation. If the defendant is correct that his Rule 29 motion should be granted at the close of the Government's case-in-chief, the defendant would not get a second bite at the apple after appeal. That litigation would end at that point.

went into effect, this Court decided *United States v. Calderon*, 348 U.S. 160 (1954).

Calderon addressed sufficiency of the evidence to convict. That defendant maintained that, because there was insufficient proof of corpus delicti, a statement of that defendant could not be considered in evaluation of the sufficiency of the evidence. That defendant testified at his trial and his testimony was used to establish the corpus delicti. The Supreme Court then found sufficient evidence to sustain the conviction. *Calderon* did not hold that defendant Calderon could not raise sufficiency of the evidence on appeal. The actual words of *Calderon* that were part of the holding of that case are: "The reviewing courts, however, can seek corroborative evidence in the proof of both parties where, as in this case, the defendant introduces evidence in his own behalf after his motion for acquittal has been overruled. Cf. *Bogk v. Gassert*, 149 U.S. 1.[Footnote] n.1." *Id.* 348 U.S. at 164 n.1.[6]

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[6] That is the construction of *Calderon* that the Supreme Court gave in the subsequent decision *McGautha v. California*, 402 U.S. 183 at 215 (1971) (if defendant testifies, defendant risks bolstering Government's case enough for it to support a verdict of guilt). Most recently, the Supreme Court in *Smith v. Massachusetts*, 543 U.S. 462 at 473 (2005) stated the appropriate rule for petitioner Trucchio's appeal, citing both *Calderon* and *McGautha*: "Many jurisdictions still follow the traditional rule that after trial or on appeal, sufficiency-of-the-evidence challenges are reviewed **on the basis of the entire trial record**, even if the defendant moved for acquittal when the prosecution rested and the court erroneously denied that motion."

With the exception of the express provision of 29(b) that applies to a trial judge's reservation of the court's decision on a motion made at the close of the Government's case-in-chief, this is still the law in the federal system today and does apply to petitioner Trucchio's appeal. This principle of law is merely that subsequent evidence can cure or render harmless any error that a judge makes in denying a Rule 29

(Continued on following page)

Calderon does not hold that a defendant, who introduces evidence in his own behalf after denial of a motion for a judgment of acquittal at the close of the Government's case-in-chief and who does not renew his motion for a judgment of acquittal at the close of all of the evidence, forfeits his right to review of sufficiency of the evidence on appeal under the normal standard of review for that motion. *Calderon* neither mentioned Rule 29 nor cited *Perovich v. United States*, 205 U.S. 86 (1907).

Calderon does contain a footnote that appears to support the lower appellate court's position. Footnote 1 of the *Calderon* opinion, 348 U.S. at 164 n.1 states:

> n.1. By introducing evidence, the defendant waives his objections to the denial of his motion to acquit. *Lii v. United States*, 198 F.2d 109 [9th Cir. 1952], *Leeby v. United States*, 192 F.2d 331 [8th Cir. 1951]; *Gaunt v. United States*, 184 F.2d 284 [1st Cir. 1950]; *Mosca v. United States*, 174 F.2d 448 [9th Cir. 1949]; *Hall v. United States*, 83 U.S. App. D.C. 166, 168 F.2d 161 [1947]. * * * *

That portion of footnote 1 **was not a holding** of *Calderon* and was not binding authority for future cases. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. __ at __, slip opinion at page 11 (March 5, 2007); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 at 478-479 (2006).

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motion at the close of the Government's case-in-chief. That concept hardly equates with a legal principle that a defendant, who makes a motion complying with the only necessary requirements contained in the wording of Rule 29 to preserve his sufficiency-of-the-evidence issue, forfeits that legal issue at the appellate level by not renewing that motion after introduction of evidence by the defense.

In *Olano v. United States*, 507 U.S. 725 (1993), this Court provided a theoretical basis to determine if a defendant has forfeited his right to appellate review of an issue. *Olano* established the difference between an intentional waiver of a legal error by a defendant and a forfeiture of a legal right, which is the failure to timely assert a right. The Eleventh Circuit has never made an *Olano* analysis of Rule 29.

Clearly, in petitioner Trucchio's case, there was no waiver of the right to a judgment of acquittal. Not only was a motion for a judgment of acquittal made at the close of the Government's case-in-chief, but defense counsel requested a jury instruction and argued insufficiency of the evidence to the jury, among other things, regarding the statute of limitations issue. Likewise, a review of the express provisions of Rule 29, as discussed earlier in this petition, establishes that there is no requirement that petitioner Trucchio renew his motion for judgment of acquittal after making that motion at the close of the Government's case-in-chief. Consequently, there is no forfeiture of the right to review of that motion at the appellate court level, because petitioner Trucchio timely asserted in the trial court his right to acquittal. Accordingly, there is no basis to consider whether petitioner Trucchio's conviction was "plain error" under Rule 52 of the Federal Rules of Criminal Procedure.[7] At Trucchio's

[7] The holding in *United States v. Milkintas*, 470 F.3d 1339 (11th Cir. 2006) does not comply with *Olano*. The concept of a "miscarriage of justice" is derived from **collateral** review jurisprudence and means that a defendant is actually innocent. *Olano*, 507 U.S. at 736. There is no statement in *Olano* limiting review to the "shocking" nature of the forfeited error. How *Olano* actually is to be applied to the failure to make any Rule 29 in the trial court remains to be seen, but certainly is

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trial, the trial judge was given the opportunity to rule on the motion for a judgment of acquittal under the same standard of review as should be used by the appellate court.

The principle of law followed by the lower appellate court, as stated most recently in *United States v. Milkintas*, 470 F.3d 1339 (11th Cir. 2006), is one that makes it practically impossible for a criminal defendant to obtain acquittal on appeal and is not grounded in the wording of Rule 29.

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not presented in petitioner Trucchio's appeal, since petitioner Trucchio did make a Rule 29 motion in the trial court during his trial.

Carlisle v. United States, 517 U.S. 416 (1996) involved the forfeiture of the right to consider a Rule 29 motion. One was never made in the trial court pursuant to Rule 29(a) or (b) and was filed one day too late to permit Rule 29(c) consideration by the trial court. Only the concurring opinion of Justice Ginsburg mentions that defendant Carlise could challenge sufficiency of the evidence on appeal subject to the "plain error" standard, but does not discuss what plain error review entails in the context of a Rule 29 motion.

A "shock the conscience" concept is grounded in the Due Process Clause. The Due Process Clause analysis for sufficiency of the evidence is addressed in *Jackson v. Virginia*, 443 U.S. 307 (1979) and requires that there must be sufficient evidence for any rational finder of fact to find every element of the crime beyond a reasonable doubt, when viewing the evidence in a light most favorable to the prosecution. But, *Jackson*, itself, establishes that this due process standard is identical to that to be applied in motions for judgment of acquittal in federal criminal trials. *Jackson*, 443 U.S. at 318 n.11. Thus, the standard established in the Eleventh Circuit's *Milkintas* opinion makes no sense and is grounded in no more than verbiage full of sound and fury, signifying nothing. Indeed, a Due Process Clause review in the appellate court should be no different than appellate court review of a preserved Rule 29 motion.

The need for review of this question is highlighted by the number of recent opinions of the lower federal appellate courts that find a "waiver" or forfeiture of the right to review a Rule 29 motion that is not renewed at the close of all of the evidence. *United States v. Maldonado-Garcia*, 446 F.3d 227 at 230 (1st Cir. 2006); *United States v. Askew*, 203 Fed. Appx. 414 at 417 (3rd Cir. 2006); *United States v. Vasquez-Garcia*, 2007 U.S. App. LEXIS 7041 (5th Cir. March 26, 2007); *United States v. Sandles*, 469 F.3d 508 at 513 n.3 (6th Cir. 2006) (recognizing circuit precedent but distinguishing on particular facts); *United States v. Banks*, 405 F.3d 559 at 569 (7th Cir. 2005); *United States v. Parchmon*, 14 Fed. Appx. 719 (8th Cir. 2001); *United States v. Littlesun*, 201 Fed. Appx. 568 (9th Cir. 2006); *United States v. Kelley*, 187 Fed. Appx. 876 at 883 (10th Cir. 2006); *United States v. Milkintas*, 470 F.3d 1339 at 1343 (11th Cir. 2006); *United States v. Booker*, 436 F.3d 238 at 241 (D.C. Cir. 2006).

Only this Supreme Court can correct an error of law that all of the lower appellate courts are guilty of committing. Indeed, this situation is what gives meaning to what a **Supreme** Court is intended to be. On this issue, there never will be a conflict among the circuits. Once a circuit panel has established the rule, the error perpetuates itself forever within the circuit and, given the fact that no other circuit has a different rule, only the Supreme Court can correct that legal error. This Court should correct this anachronistic concept of waiver that has become a "Gotcha" rule of law benefiting only the Government. It hardly serves the interest of justice. The lower appellate courts should be required to follow Rule 29 as it is written.

Question Two

The statute of limitations period for a criminal RICO conspiracy prosecution is five years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 at 155-156 (1987); 18 U.S.C. § 3282(a). Proof of an overt act in furtherance of that conspiracy is not necessary to convict for a criminal RICO conspiracy. The agreement to violate RICO, in and of itself, is the crime. *Salinas v. United States*, 522 U.S. 52 at 63 (1997); *see United States v. Shabani*, 513 U.S. 10 (1994).

This Court rejected the argument that a criminal conspiracy does not have a measurable statute of limitations period. Criminal conspiracy has a statute of limitations period just like every other federal crime. While an overt act is not an element of a RICO criminal conspiracy, proof of an overt act in furtherance of that conspiracy is necessary to establish that the conspiracy is continuing into the limitations period. *Toussie v. United States*, 397 U.S. 112 at 122 (1970); *Fiswick v. United States*, 329 U.S. 211 at 216 (1946). There must be continuous cooperation to keep this illegal business enterprise, as an entity, functioning. *See Fiswick v. United States*, 329 U.S. 211 at 216 (1946). The Government had the burden of proving that this RICO conspiracy was still in existence on December 2, 1998 and that at least one overt act in furtherance of that conspiracy was performed after that date. *Grunewald v. United States*, 353 U.S. 391 at 396 (1957) (construing 18 U.S.C. § 3282).[8]

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[8] *United States v. Recio*, 537 U.S. 270 (2003) holds that a conspiracy is not terminated automatically as a matter of law, when the Government defeats that conspiracy's objective, but the conspirators

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In this case, the Government proved that members of this conspiracy were still alive after December 2, 1998; but failed to prove any overt act that was committed in furtherance of the illegal business enterprise known as the Young Guns and committed to keep that illegal business functioning as an entity into the limitations period.[9] In this case, there had to be proof of an overt act after December 2, 1998. The Government never proved that any member of the Young Guns was on the street fulfilling the objective of this particular charged conspiracy **after** December 2, 1998.

The Government indicted the coconspirators and placed them together in the same federal detention center to await trial in the year 2004. The Government proved that several of those jailed coconspirators verbalized an intention to commit crimes to prevent conviction, such as silencing suspected Government witnesses. However, the Government never proved one overt act committed to realize any coconspirator's stated desires. Indeed, the

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are unaware of that fact and have neither abandoned the conspiracy nor withdrawn from it. *Recio* has no effect on this statute of limitations issue.

[9] Any activity of petitioner Trucchio after December 2, 1998 that furthered the Gambino crime family enterprise did not further the Young Guns enterprise – the crime for which petitioner Trucchio was on trial in this case. The Government agreed that the enterprise being prosecuted here was not the Gambino crime family. Petitioner Trucchio was extorting the Young Guns enterprise to pay him tribute for crimes the Young Guns enterprise was committing. Once that Young Guns enterprise disbanded, the tribute to petitioner Trucchio stopped. Petitioner Trucchio was never shown to participate in the planning of any activity or contribute in any way to any activity of a member of the Young Guns after December 2, 1998.

Government never proved that any two of those jailed conspirators agreed with each other to commit a crime in furtherance of an intent to obstruct justice. There is no evidence that two Young Guns members agreed to kill, threaten or harm any potential witness or any informant. There was no proof of communication with anyone residing outside this federal jail to accomplish those particular things. There was no evidence that any threat was made to any witness – or even attempted. There was no evidence that there was any attempt to kill anyone. Simply stated, there was **no overt act** committed by a coconspirator in furtherance of the Young Guns criminal enterprise while a coconspirator was inside the Miami Federal Detention Center.

The theory that the Government put forth at trial had already been rejected by the Supreme Court of the United States in *Grunewald v. United States*, 353 U.S. 391 (1957). Every conspiracy does not include an implicit agreement to conceal the crime to prevent detection, conviction and punishment, with the result of thereby extending the duration of a conspiracy during the phase which has concealment or escaping conviction and punishment as its sole objective. Such would create an indefinitely continuing offense that would result in an indeterminate extension of the statute of limitations. "[E]very conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statue of limitations in conspiracy cases,. . . . " *Grunewald*, 353 U.S. at 399-403 (1957). "We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury

their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished." *Grunewald*, 353 U.S. at 405. "[A] vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." *Grunewald*, 353 U.S. at 405 (court's emphasis).

Since the defendants had already been indicted, these in-jail conversations were obviously not done in an effort to conceal from the Government a crime that the Government not only knew about, but for which the Government already had returned an indictment. In 2004, there was no illegal business of the Young Guns enterprise being pursued to make money. Efforts to avoid punishment are not synonymous with continuation of the conspiracy agreement, itself.

The lower appellate court rejected petitioner Trucchio's claim that the Government failed to prove that it had complied with the applicable statute of limitations. That court accepted the Government's argument that the events of 2004 were enough to meet the Government's statute of limitations obligation. That court opined: "According to Kondrotas, Young Guns members discussed potential witnesses against them while residing in the Federal Detention Center in 2004. Kondrotas testified that Young Guns leaders discussed killing prosecutors, a potential witness residing in the Federal Detention Center, and the witness's mother." (App. 3).

The lower appellate court decided this case in a way that conflicts with the reasoning of *Grunewald v. United*

States, 353 U.S. 391 (1957). This is an important federal question concerning the statute of limitations and whether it is to be applied to a criminal RICO conspiracy, which crime does not require an overt act to be proved as an element of that crime. The continued validity of *Grunewald* is an issue of importance worthy of this Court's review.

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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2007 WL 245998 [DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT.

No. 05-14830

D.C. Docket No. 03-60267-CR-KAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD TRUCCHIO,
a.k.a. Ronnie One Arm, Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(January 30, 2007)

Before TJOFLAT, HULL and BOWMAN,* Circuit Judges.

PER CURIAM:

Ronald J. Trucchio appeals his conviction following a jury trial for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.

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* Honorable Pasco M. Bowman II, United States Circuit Judge for the Eighth Circuit, sitting by designation.

§ 1962(c), in violation of 18 U.S.C. § 1962(d). After review and oral argument, we affirm.

I. BACKGROUND

On December 2, 2003, a federal grand jury indicted Trucchio and nine codefendants, charging that the defendants had participated in a racketeering conspiracy from 1986 to the date of the indictment. The indictment[1] alleged that Trucchio was a "captain" in the Gambino Crime Family associated with a criminal "crew" operating in Florida and New York called the Young Guns, formerly the Liberty Posse. The indictment further charged that Trucchio supervised the criminal activities of the Young Guns, demanded and received cash payments as tribute, and instructed the gang on the distribution of proceeds. According to the indictment and the evidence at trial, the principal purpose of the Young Guns was to generate money for its members and associates from criminal activity in such a way as to avoid detection by law enforcement agents.

Trucchio alone proceeded to trial after all his codefendants pled guilty. At trial, the government presented the testimony of Trucchio's former criminal associates and a federal agent investigating the Gambino Crime Family.

For example, Michael Ciaccio, a member of a New York-based criminal crew associated with Trucchio, testified that Trucchio was a "made" member of the Gambino

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[1] The federal grand jury returned a third superseding indictment on July 20, 2004, which changed the end date of the conspiracy to July 20, 2004. For the sake of simplicity, we refer to the third superseding indictment as "the indictment."

Crime Family who accepted tribute payments derived from the Young Guns' drug sales and other criminal activities. According to Ciaccio, Trucchio grew concerned with the Young Guns' escalating violence in South Florida in 1997 and directed Ciaccio to monitor their activities and identify potential witnesses against them. Ciaccio noted that many Young Guns members had been incarcerated and stated that the gang "had broken up" in 1997. Ciaccio also testified, however, that the remaining members who were not incarcerated were like a "minor league team" that continued to perpetrate minor crimes.

Joseph Kondrotos, a member of the Young Guns, testified that Trucchio was a captain in the Gambino Crime Family. He corroborated Ciaccio's testimony that Young Guns leaders regularly paid tribute to Trucchio and described the robberies, assaults, and murders perpetrated by the Young Guns in Florida. According to Kondrotos, Young Guns members discussed potential witnesses against them while residing in the Federal Detention Center in 2004. Kondrotos testified that Young Guns leaders discussed killing prosecutors, a potential witness residing in the Federal Detention Center, and the witness's mother.

Frank Scarabino, an associate of the DeCavalcante Crime Family of New Jersey, provided a general description of the structure of organized crime families and testified that Trucchio was a captain in the Gambino Crime Family.

Federal Bureau of Investigation ("FBI") Special Agent George Gabriel testified as an expert on the Gambino Crime Family. Agent Gabriel described the structure of the American Mafia and stated that Trucchio was at least an

acting captain in the Gambino Crime Family. Agent Gabriel's knowledge was gleaned from informants' statements, cooperating witnesses, and surveillance.

At the close of the government's case, Trucchio moved for a judgment of acquittal. After the district court denied this motion, Trucchio called one witness on his behalf and failed to renew his motion at the close of all the evidence.

After three days of deliberation, the jury found Trucchio guilty of RICO conspiracy under 18 U.S.C. § 1962(d) for his involvement with the Young Guns. The district court sentenced Trucchio to 240 months' imprisonment, three years of supervised release, and a $25,000 fine. This appeal followed.

II. DISCUSSION

On appeal, Trucchio raises these assignments of error: (1) the prosecution was time-barred because the indictment was filed six years after the Young Guns had broken up, outside RICO's five-year statute of limitations; (2) the government presented insufficient evidence that Trucchio participated in a RICO conspiracy in violation of § 1962(d) because, *inter alia,* he did not direct or manage the Young Guns; (3) the district court erred in admitting certain FBI expert testimony, including testimony about the structure of organized crime families and Trucchio's status as a captain in the Gambino Crime Family; and (4) the district court breached its duty to inquire *sua sponte* whether Trucchio's counsel had an actual conflict of interest, requiring us to remand for an evidentiary hearing.

After careful review of the record, as well as the arguments of both parties presented in their briefs and at

oral argument, we conclude that all of Trucchio's claims lack merit. Only his third and fourth claims warrant further discussion.

As to the FBI expert testimony, Trucchio contends that Agent Gabriel's testimony based on informants' statements was admitted in violation of the Confrontation Clause. Even assuming *arguendo* that Agent Gabriel's testimony constituted inadmissible testimonial hearsay under *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354 (2004), the admission of this testimony was harmless error.[2] Agent Gabriel's testimony was merely cumulative of other testimony presented at trial – Scarabino also testified about the structure of organized crime families, and Scarabino and Kondrotos testified that Trucchio was a captain in the Gambino Crime Family. Moreover, because the RICO conspiracy charges stemmed from Trucchio's involvement with the Young Guns, Agent Gabriel's testimony about Trucchio's ties to the Gambino Crime Family concerned issues collateral to the offense conduct. Given the cumulative nature of Agent Gabriel's testimony and the strength of the government's other evidence linking Trucchio to the Young Guns, the admission of Agent Gabriel's testimony was harmless beyond a reasonable doubt. *See United States v. Mills,* 138 F.3d 928, 939-41 (11th Cir. 1998) (finding that a Confrontation Clause error was harmless in light of the prosecution's strong case and the cumulative nature of the challenged testimony).

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[2] The denial of a defendant's Confrontation Clause rights is reviewed for harmless error. *See United States v. Ndiaye,* 434 F .3d 1270, 1286 (11th Cir.), *cert. denied, Diaw v. United States,* ___ U.S. ___, 127 S.Ct. 128 (2006).

Trucchio's contention that the district court had a duty to inquire into a potential conflict of interest involving his trial counsel is also meritless. During Trucchio's trial, Ciaccio testified that Joseph Corozzo, Sr., the father of Trucchio's trial counsel, was involved with the Gambino Crime Family. Trucchio's counsel, Joseph Corozzo, Jr., asked the district court to clarify that the witness was speaking about counsel's father and not counsel himself. Ciaccio clarified that he was discussing counsel's father. Although other witnesses mentioned Corozzo, Sr., there was no other reference to his relationship to Trucchio's counsel.

Even if no party raises a conflict of interest issue at trial, the trial judge has a duty to inquire into a potential conflict *sua sponte* if it is "sufficiently apparent" at the time of trial. *See Wood v. Georgia*, 450 U.S. 261, 272, 101 S.Ct. 1097, 1104 (1981). In the record in this appeal, Trucchio has made no showing that his counsel had a conflict of interest or that any potential conflict of interest was "sufficiently apparent" in order to trigger a duty to inquire by the district court.[3] While the record in *Wood* "strongly suggest[ed]" a potential conflict arising from the trial counsel's inconsistent interests, nothing in this record

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[3] In this appeal, Trucchio has made no claim of ineffective assistance of counsel; instead, Trucchio's claim is that the district court had a duty to inquire *sua sponte* about a potential conflict of interest. As we have previously stated, "[e]xcept in the rare instance when the record is sufficiently developed, we will not address claims for ineffective assistance of counsel on direct appeal." *United States v. Verbitskaya*, 406 F .3d 1324, 1337 (11th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 1095 (2006); *see also Massaro v. United States*, 538 U.S. 500, 504, 123 S.Ct. 1690, 1694 (2003) ("[I]n most cases a motion brought under [28 U.S.C.] § 2255 is preferable to direct appeal for deciding claims of ineffective assistance.").

indicates that Corozzo, Jr. had any inconsistent interests that should have been apparent to the trial judge. *Id.* at 273, 101 S.Ct. at 1104. The identity of trial counsel's father by itself did not make a potential conflict "sufficiently apparent" to impose upon the trial judge a duty to investigate it *sua sponte*. Furthermore, nothing in the record presented in this direct appeal justifies a remand for an evidentiary hearing.

For the foregoing reasons, we affirm Trucchio's conviction.

AFFIRMED.